

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

List D  
S CI 2011 6606

B E T W E E N

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Plaintiff

and

OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2 & ORS (ACCORDING TO THE  
ATTACHED SCHEDULE)

Defendants

SECOND AFFIDAVIT OF CLINTON CHARLES HINCHEN  
(SOLORA RIGHTS PROCEEDING)

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Date of document: 19 September 2012

Filed on behalf of: The Plaintiff

Prepared by:

**Allens**  
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101 Collins Street  
Melbourne VIC 3000

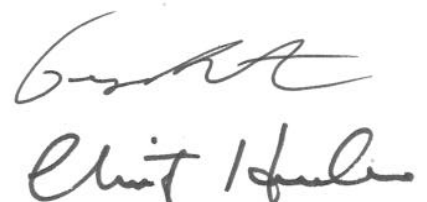
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I, **CLINTON CHARLES HINCHEN** of Allens, 101 Collins Street, Melbourne, in the State of Victoria,

Lawyer, SAY ON OATH that:

1. I am a solicitor and a partner in the firm Allens. I have the care and conduct of this proceeding (the **Solora Rights Proceeding**) on behalf of the plaintiff, Australia and New Zealand Banking Group Limited (**ANZ**). I am authorised to make this affidavit on behalf of ANZ.

  
Clinton Hinchen

2. Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.

**Exhibits to this affidavit**

3. There are a large number of documents referred to in this affidavit, some of which are of considerable size and one of which (as I explain below) is confidential. Given the size and number of documents, I have arranged for each of the relevant documents to be placed on one of three CD-ROMs (as numbered below) and given an individual document number and title on the relevant CD-ROM. When referring to each such document for the first time in the balance of my affidavit, I also refer in bold font in parenthesis to the relevant CD-ROM (by reference to the exhibit number assigned to each CD-ROM as set out below) and document number. Now produced and shown to me are the following CD-ROMs:
- (a) a CD-ROM, marked '**Exhibit CCH-1**', containing true copies of each of the project documents referred to in paragraph 18 below (documents 1 to 5 on Exhibit CCH-1);
  - (b) a CD-ROM, marked '**Exhibit CCH-2**', containing true copies of the documents referred to in paragraphs 3, 4, 8, 13, 19, 20, 27, 30, 38, 39, 41, 60 and 65 below (documents 1 to 17 on Exhibit CCH-2); and
  - (c) a confidential CD-ROM, marked '**Confidential Exhibit CCH-3**', containing a true copy of the Solora Sale Contract referred to and defined in paragraph 23 below (document 1 on Confidential Exhibit CCH-3).

Confidential Exhibit CCH-3 is marked as a confidential exhibit due to the Solora Sale Contract containing confidentiality provisions and by reason of paragraph 7 of the orders made by Justice Davies on 26 February 2010 in Supreme Court of Victoria proceeding number SCI 2010 398 (**26 February 2010 Orders**) (**Exhibit CCH-2, document 1**).



### Introduction

4. ANZ commenced the Solora Rights Proceeding on 6 December 2011 by filing an originating motion, summons and supporting affidavit sworn by me on 5 December 2011 (**Exhibit CCH-2, documents 2, 3 and 4**).
5. The Solora Rights Proceeding concerns the net proceeds arising from the sale of the land and related assets on which the 2005 Timbercorp Citrus Project (the **Citrus Project**) was conducted.
6. The purpose of the Solora Rights Proceeding is to determine how those net sale proceeds are to be apportioned between:
  - (a) ANZ as the secured creditor;
  - (b) the grower investors in the Citrus Project (the **Growers**); and
  - (c) other interested parties claiming an interest in the net sale proceeds.
7. Robert and Elizabeth Bugden have been appointed by the Court in accordance with rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (the **Rules**) to represent the interests of the Growers in the Solora Rights Proceeding (the **Representative Growers**).
8. On 25 July 2012, a deed of compromise was executed by the parties to the Solora Rights Proceeding (including the Representative Growers) to effect a compromise of the proceeding subject to certain conditions, including approval of the compromise by the Court in accordance with rule 16.01(4) of the Rules (the **Solora Deed of Compromise**) (**Exhibit CCH-2, document 5**).

### Purpose of this affidavit

9. This affidavit is made in support of ANZ's summons dated 27 August 2012 by which (among other things), in accordance with Rule 16.01(4) of the Rules, application is

  
Chris Hunter

made to this Honourable Court for approval of the compromise the subject of the Solora Deed of Compromise.

10. I address the following matters in this affidavit (defined terms used in this paragraph have the meaning ascribed to them elsewhere in this affidavit):

- (a) the Citrus Project the subject of the Solora Rights Proceeding (paragraphs 12 to 20 below);
- (b) ANZ's security position, appointment of receivers and managers and the sale of the Solora property (paragraphs 21 to 28 below);
- (c) conditions to completion of the Solora Sale Contract (paragraph 29 below);
- (d) application to the Court to satisfy the conditions precedent to the sale of the Solora property (paragraphs 30 to 31 below);
- (e) the net sale proceeds the subject of the Solora Rights Proceeding (paragraphs 32 to 33 below);
- (f) completion of the Solora Sale Contract and deposit of the Net Sale Proceeds (paragraphs 34 to 35 below);
- (g) the parties to the Solora Rights Proceeding (paragraph 36 to 45 below);
- (h) the issues for determination in the Solora Rights Proceeding (paragraphs 46 to 48 below);
- (i) the Rights Issue (paragraph 49 below);
- (j) the Valuation Issue (paragraph 50 below);
- (k) entitlements (if any) to the Net Sale Proceeds of ANZ, OIM#2 and the Growers (paragraph 51 below);
- (l) Justice Davies' Judgment in the Almond Land Rights Proceeding (paragraphs 52 to 54 below);


- (m) appeal of Justice Davies' Judgment (paragraph 54 below);
  - (n) relevance of the Almond Land Rights Proceeding to ANZ's application for approval of the Solora Deed of Compromise (paragraphs 55 to 56 below);
  - (o) application of Justice Davies' Judgment in respect of the Rights Issue (paragraph 57 below);
  - (p) application of Justice Davies' Judgment in respect of the Valuation Issue (paragraphs 58 to 69 below);
  - (q) the Solora Deed of Compromise (paragraphs 70 to 77 below); and
  - (r) communications with ASIC (paragraph 78 below).
11. Pursuant to clause 8 of the Solora Deed of Compromise (Exhibit CCH-2, document 5), the parties have agreed that, if the condition precedent in clause 3.1 of the deed is not satisfied by 31 December 2012, then the deed ceases to have any effect and, in that event (among other things), the deed, any documents prepared or circulated pursuant to the deed, and any other documents prepared or circulated in anticipation of, or for the purpose of, the application the subject of ANZ's summons filed on 27 August 2012 (including, among other things, this affidavit) may not be referred to or tendered in evidence in the Solora Rights Proceeding, the Almond Land Rights Appeal Proceeding or the related proceedings to which I refer below.

**The Citrus Project the subject of the Solora Rights Proceeding**

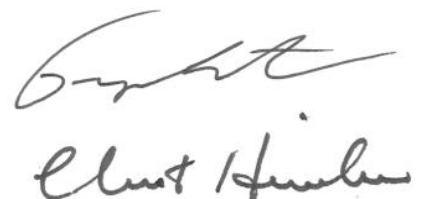
12. The Citrus Project was governed by a suite of project documents including a constitution, leases and licence agreements (Exhibit CCH-1, documents 1 to 5). The members of the Citrus Project are referred to in the project documents as "**Growers**" and, as noted above, I adopt that terminology in this affidavit.
13. I have reviewed:
- (a) the project documents for the Citrus Project; and



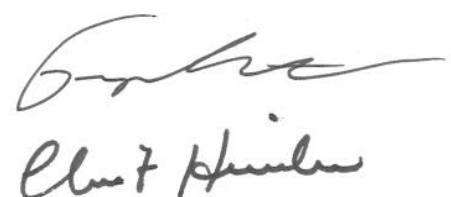
- (b) the affidavit of David Laurence McEvoy sworn 25 January 2010 in Supreme Court of Victoria proceeding number S CI 2010 398 and tendered in evidence in that proceeding (the **McEvoy Affidavit**) (**Exhibit CCH-2, document 6**, without exhibits).

The matters to which I depose in paragraphs 14 to 35 below are based on these documents, the other documents to which I refer in these paragraphs and my own knowledge.

14. The purpose of the Citrus Project was the cultivation of citrus trees and the harvesting and processing of citrus for commercial sale. The land the subject of the Solora Rights Proceeding, on which the Citrus Project was conducted and the citrus trees were cultivated, is referred to as "Solora" (the **Solora property**).
15. The Solora property was owned by the first defendant, OIM#2 Pty Ltd (Receivers and Managers Appointed) in its capacity as trustee of Timbercorp Orchard Trust #2 (**OIM#2**).
16. Based on the McEvoy Affidavit, I believe that, as at the date of swearing that affidavit, Timbercorp Orchard Trust #2 (**TOT#2**) was a wholly owned sub-trust of Timbercorp Primary Infrastructure Fund (**TPIF**), a property trust which, at that time, was listed on the ASX. I believe also that, at that time, Timbercorp Limited (In Liquidation) (**TL**) owned 46.4% of the units in TPIF.
17. Timbercorp Securities Limited (in Liquidation) (**TSL**) was the responsible entity of the Citrus Project. The Citrus Project is a registered managed investment scheme under Part 5C of the *Corporations Act 2001* (Cth) (the **Act**).
18. The project documents for the Citrus Project included a series of lease agreements which were executed by OIM#2 and certain Timbercorp Group entities in respect of the Solora property, namely:



- (a) a lease between OIM#2 (as lessor) and TL (as lessee) dated 19 May 2005 (and relevant deed of variation) pursuant to which OIM#2 leases the Solora property to TL (**Exhibit CCH-1, documents 1 and 2**);
  - (b) an underlease between TL (as underlessor) and TSL (as underlessee) dated 19 May 2005 (and relevant deed of variation) (**Exhibit CCH-1, documents 3 and 4**); and
  - (c) a number of licence agreements between (inter alia) TSL and each Grower (**Exhibit CCH-1, document 5**).
19. I have read the affidavit of Paul William Kirk sworn 23 February 2011 and tendered in evidence in Supreme Court of Victoria proceeding number S CI 2011 888 (the **Kirk Affidavit**) (**Exhibit CCH-2, document 7**, with relevant exhibits). Based on paragraph 6 of the Kirk Affidavit, I understand that the Citrus Project was also conducted on a second property, the Kangara property, which was owned by Align Funds Management Limited in its capacity as responsible entity of the Timbercorp Orchard Trust (Receivers and Managers Appointed).
20. Based on paragraph 6 of the Kirk Affidavit, I understand that the Kangara property and Solora property have been the subject of a separate sales process. Having regard to paragraph 3 of the orders of the Honourable Justice Judd made on 15 March 2011 in Supreme Court of Victoria Proceeding SCI 2011 888 (the **Justice Judd Orders**) (**Exhibit CCH-2, document 8**), I understand that the net proceeds of sale of the Kangara property and associated assets, including water rights associated with the property, are currently being held on trust pending the hearing and determination of a separate proceeding to determine the rights of parties asserting claims to those net sale proceeds. Accordingly, the sale of the Kangara property is not addressed further in this affidavit.



Paul William Kirk

**ANZ's security position, appointment of receivers and managers and sale of the Solora property**

21. On 16 September 2009, David Laurence McEvoy and Paul William Kirk of PricewaterhouseCoopers were appointed by ANZ as joint and several receivers and managers of the charged assets of OIM#2, including the Solora property.
22. Michael Fung of PricewaterhouseCoopers replaced Mr McEvoy as joint and several receiver of these assets on 18 May 2010. Together, Mr Fung and Mr Kirk are referred to in this affidavit as the "**Receivers**".
23. On 18 December 2009 OIM#2, the Receivers, Agriproperty Pty Ltd (**Agriproperty**) and CostaExchange Limited (as guarantor) signed a contract for the sale of the Solora property and associated assets falling within the definition of "Property" in that contract (the **Solora Sale Contract**) (**Confidential Exhibit CCH-3, document 1**).
24. The Solora property was, until settlement of the Solora Sale Contract, subject to certain securities granted in favour of ANZ (as referred to in paragraph 27 below). These securities secured amounts owing to ANZ pursuant to a \$9.398 million Loan Facility provided to OIM#2 on about 30 September 2005, which was later varied to \$11.4 million by a Deed of Variation dated 18 April 2007 (the **TOT#2 Facility**).
25. I am informed by Jonty Ephron, Director, ANZ Lending Services, and believe, that the total amount of the secured debt owed to ANZ under the TOT#2 Facility as at 31 August 2012 was AUD\$13,360,280.51, with the interest margin (including a 2% default rate) continuing to accrue at 2.75% per annum together with a facility fee accruing at 1% per annum.
26. In light of the accrual of interest (including default interest) and fees on ANZ's secured debt (as noted at paragraph 25 above), if and to the extent that there will be a surplus of net sale proceeds available after repayment of the secured debt in the Solora Rights



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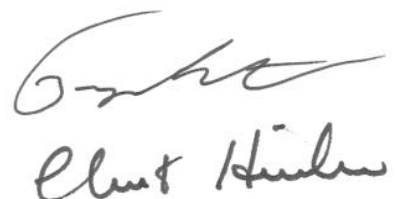


Proceeding, the potential entitlement of any unsecured creditors to that surplus is being eroded.

27. The securities held by ANZ in relation to the above facilities included the following in respect of the TOT#2 Facility:
- (a) a first ranking fixed and floating charge dated 30 September 2005 from OIM#2 over all rights, property and undertaking of OIM#2 which relate to TOT#2 (**Exhibit CCH-2, document 9**); and
  - (b) a real property mortgage dated 27 October 2005 from OIM#2 over the Solora property (**Exhibit CCH-2, document 10**).
28. Based on paragraph 13 of the McEvoy Affidavit, I believe that ANZ was the only secured creditor of OIM#2 as at the date Mr McEvoy deposed to the matters in that affidavit (i.e. 25 January 2010) in support of the Receivers' application to this Honourable Court for orders, declarations or directions in order to satisfy the conditions precedent under the Solora Sale Contract (as addressed in the following section of this affidavit).

**Conditions to completion of the Solora Sale Contract**

29. The Solora Sale Contract provided, at clause 5.1(a), that the sale of the Solora property was conditional upon, among other things:
- (a) the Court directing that the Liquidators of TSL were justified in procuring TSL, in its capacity as responsible entity of the Citrus Project, to extinguish all of the rights of Growers in respect of the property the subject of the Solora Sale Contract, including the Growers' licences (**Grower Licences**); and
  - (b) the Court making orders determining the rights of all and any persons to all or any part of the net proceeds of the sale under the Solora Sale Contract, or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court.



Elton Hinder

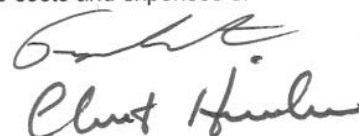
**Application to the Court to satisfy the conditions precedent to the sale of the Solora property**

30. In order to satisfy these (and related) conditions precedent, the Liquidators of TSL (in its capacity as responsible entity of the Citrus Project) brought an application on 29 January 2010, following which Justice Davies delivered judgment (**26 February 2010 Judgment**) (CCH-2, document 11) and made the 26 February 2010 Orders (Exhibit CCH-2, document 1).
31. Paragraphs 2 and 3 of the 26 February 2010 Orders satisfied the conditions precedent to the sale of the Solora property. These paragraphs were in the following terms.
  2. The Second and Third Plaintiffs (in their capacity as Liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the 2005 Timbercorp Citrus Project (ARSN 114 091 299) (**Citrus Scheme**) to terminate or surrender each relevant Grower licence and extinguishing all of the rights of Growers (investors in the Citrus Scheme) in respect of the assets the subject of the Sale Contract (**Grower Rights**).
  3. The Second and Third Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to enable OIM#2 and the Receivers to perform the Sale Contract.

**The net sale proceeds the subject of the Solora Rights Proceeding**

32. In the 26 February 2010 Judgment, Justice Davies stated at paragraph 29 that:
 

I note that TSL will not exercise the power to surrender the licence agreements until the sale contract is completed and the purchase price paid to ensure that sale proceeds are received and that the sale proceeds are to be held in trust pending the Court's determination of the apportionment of those sale proceeds amongst the relevant groups of stakeholders.
33. Accordingly, Justice Davies made orders in accordance with paragraphs 4 to 6 of the 26 February 2010 Orders (Exhibit CCH-2, document 1) in the following terms:
  4. Upon completion of any sale under the Sale Contract the net proceeds of sale (after payment of the Receivers' selling costs and expenses, retentions (if any), the costs and expenses of



the Receivers referable to the preservation and realisation of the assets the subject of the Sale Contract, and the costs and expenses of the liquidators of the First Plaintiff which are to be reimbursed by the Receivers in accordance with the Solara Grower Rights Deed (as defined in the McEvoy Affidavit) (**Net Sale Proceeds**) are to be held by the Receivers of OIM#2 in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act), pending the hearing and determination by the Court of a proceeding to determine which person or persons have any rights to all or any part of the Net Sale Proceeds, and to be held on trust for the person or persons who are able to establish such a right, or until further order of the Court.

5. Insofar as the Australia and New Zealand Banking Group Limited has any rights to the assets the subject of the Sale Contract, whether under its securities over those assets or otherwise, nothing in the release of those securities upon completion of the Sale Contract will prejudice those rights for the purposes of its claim to all or any part of the Net Sale Proceeds.
6. Insofar as the Growers have any rights to the assets the subject of the Sale Contract nothing in orders 2 and 3 above, or any action taken thereunder by the Second and Third Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Sale Proceeds.

In the balance of this affidavit, the defined term, **Net Sale Proceeds**, has the same meaning as that ascribed to the same defined term in paragraph 4 of the 26 February 2010 Orders (as set out above).

#### **Completion of the Solara Sale Contract and deposit of the Net Sale Proceeds**

34. I have been informed by Mr Fung and believe that:

- (a) settlement of the Solara Sale Contract occurred on 9 April 2010; and
- (b) on or about 23 June 2010, in accordance with paragraphs 4 to 6 of the 26 February 2010 Orders, the Net Sale Proceeds, which at that time were in the amount of \$13,327,604.51, were transferred to the following interest bearing account of the Receivers:



**Account name:** OIM#2 Pty Ltd As Trustee for the Timbercorp Orchard  
Trust #2 (Receivers and Managers Appointed)

**BSB:** 013-128

**Account number:** 8355-80437

(the ***Receivers' Account***)

35. I am informed by Mr Fung's solicitor, Mr Kirk Warwick of Norton Rose, and believe that the balance of the Net Sale Proceeds as at 14 September 2012 (excluding interest that has accrued since the funds were re-invested in August 2012 but which has not yet capitalised to the relevant account) was \$13,552,000.00.

**The parties to the Solora Rights Proceeding**

**(i) ANZ**

36. ANZ is the plaintiff in the Solora Rights Proceeding. Its claim to the Net Sale Proceeds arises out of its position as the secured lender to OIM#2 as the former owner of the Solora property.

**(ii) The Receivers**

37. As noted in paragraphs 21 and 22 above, the Receivers are appointed as receivers and managers of the charged assets of OIM#2. They have been joined as the second and third defendants to the Solora Rights Proceeding in their capacity as 'stakeholder' of the Net Sale Proceeds.
38. I have read the letter dated 23 September 2011 from Mr Fung to the directors of OIM#2 (**Exhibit CCH-2, document 12**). Based on that letter, I believe that, subject to reserving their right to be heard in respect of certain identified matters, it is not the Receivers' intention to participate actively in the proceeding but, in their role as stakeholder, to simply abide the Court's orders regarding the Net Sale Proceeds.



39. In this regard, I note that paragraph 7 of the orders made by her Honour Justice Davies in the Solora Rights Proceeding on 16 December 2011 (the **16 December 2011 Orders**) (**Exhibit CCH-2, document 13**) provided that:


Until further order, the Second and Third Defendants are excused from taking any step in the proceeding, including court appearances, but may do so in relation to the following matters:

- (a) their rights to be paid their remuneration and expenses from the sale proceeds held on trust by the Second and Third Defendants pursuant to paragraph 4 of the orders (the **Funds**) (to the extent that remuneration and those expenses have not already been paid);
- (b) any allegations made about the Second and Third Defendants' personal conduct during their appointment and, in particular, with respect to the sale of the assets the proceeds of which represent the Funds; and
- (c) to ensure disposal in full of the Funds currently held on trust by the Second and Third Defendants including the Funds and the money payable under the Crop Sale Agreement.

40. As noted in paragraph 41 below, OIM#2 is represented in the Solora Rights Proceeding separately from the Receivers to ensure that it can make its own submissions to the Court in relation to its rights to the balance of the Net Sale Proceeds (if any) in the event that ANZ's secured debt is repaid in full. Based on Mr Fung's letter dated 23 September 2011, I believe that, for this reason, the Receivers have consented to the directors of OIM#2 representing the interests of OIM#2 for the limited purpose of the present proceeding (notwithstanding the ongoing receivership).

**(iii) OIM#2**

41. OIM#2 is the first defendant in the Solora Rights Proceeding. It has an interest in the outcome of this proceeding by reason of its possible entitlement to any balance of the Net Sale Proceeds remaining in the event that ANZ's secured debt is repaid in full. For this reason, OIM#2 has been joined as the first defendant to the proceeding. By letters dated 15 and 23 September 2011 (**Exhibit CCH-2, documents 14 and 15**), Maddocks



confirmed that its clients, the directors of OIM#2, consented to representing the interests of that company for the purposes of this proceeding.

**(iv) Representation of Growers**

42. I have been informed by Mr Bryan Webster of KordaMentha and believe that 156 Growers invested in the Citrus Project.
43. In light of the number of Growers who invested in the Citrus Project, and the considerable time and cost that would have been involved in locating and serving each of them, ANZ sought an order in the Solara Rights Proceeding that representatives of the Growers be appointed pursuant to rule 16.01(2) of the Rules.
44. By paragraph 3 of the 16 December 2011 Orders (Exhibit CCH-2, document 13), pursuant to rule 16.01(2) of the Rules, the Representative Growers were appointed as representatives of the Growers in the Citrus Project.
45. By paragraph 4 of the 16 December 2011 Orders, the Representative Growers were joined as the fourth defendants in the Solara Rights Proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the Rules.

### **The issues for determination in the Solora Rights Proceeding**

46. As noted in paragraph 6 above, the purpose of the Solora Rights Proceeding is to resolve the dispute as to how the Net Sale Proceeds are to be apportioned between:
- (a) ANZ as the secured creditor;
  - (b) the Growers; and
  - (c) other interested parties claiming an interest in the Net Sale Proceeds.
47. No party in the Solora Rights Proceeding has filed submissions in the proceeding to date as the proceeding has not progressed beyond the directions hearing on 16 December 2011 at which the 16 December 2011 Orders were made (see paragraphs 39

Christ/Händler

and 44 above). Accordingly, it is not possible yet to identify with complete certainty the contested issues to be determined at any trial of the proceeding.

48. I believe, however, that, based on the matters referred to in the following paragraphs, and based also on:

- (a) the issues raised for determination in the Almond Land Rights Proceeding and Justice Davies' judgment in that proceeding (see further paragraphs 52 to 54 below); and
- (b) the position adopted by the appellant representative growers in the Almond Land Rights Appeal Proceeding in their grounds of appeal filed in that proceeding (see further paragraph 54 below),

the following are likely to be the key issues addressed at any trial of the Solara Rights Proceeding:

- (c) what rights (if any) ANZ, OIM#2 and the Growers have to the Net Sale Proceeds (the ***Rights Issue***);
- (d) what the value is of any such rights of ANZ, OIM#2 and the Growers respectively (the ***Valuation Issue***); and
- (e) how much (if any) of the Net Sale Proceeds ANZ, OIM#2 and the Growers are entitled to receive.

I address these three issues in paragraphs 49 to 51 below.

#### **The Rights Issue**

49. In respect of the Rights Issue, having regard to the matters referred to at paragraph 48 (a) and (b) above, I believe that the relevant matters which will arise for consideration in determining the entitlements of the parties to the Net Sale Proceeds are as follows:




- (a) the nature and extent of the rights (if any) of, on the one hand, ANZ and, on the other hand, the Growers, in respect of the assets the subject of the Solora Sale Contract; and
- (b) the extent to which such rights gave rise to an entitlement to any part of the proceeds of the sale of the assets.

### **The Valuation Issue**

50. In respect of the Valuation Issue, having regard to the matters referred to at paragraph 48 (a) and (b) above, I believe that the relevant matters which will arise for consideration are as follows:

- (a) to the extent that the Growers held rights (whether proprietary or contractual in nature) which entitle them to make a claim against the Net Sale Proceeds, for the purpose of valuing those rights:
  - (i) what is the appropriate valuation methodology to adopt;
  - (ii) is the Growers' case analogous to a loss of opportunity claim; and
  - (iii) to what extent was the Citrus Project the subject of the proceeding viable such that it would run its full term under the relevant constituent documents or otherwise;
- (b) what was the value of the Growers' rights (if any); and
- (c) how, having regard to the foregoing, the proceeds available for distribution from the Net Sale Proceeds are to be apportioned between the Growers, ANZ and other interested parties.

  
Christopher Hume



**Entitlements (if any) to the Net Sale Proceeds of ANZ, OIM#2, and the Growers**

51. The determination of the entitlements (if any) of ANZ, OIM#2 and the Growers to the Net Sale Proceeds will turn on the resolution by this Honourable Court of the matters bearing on the Rights Issue and the Valuation Issue as referred to in the preceding paragraphs.

**Justice Davies' judgment in the Almond Land Rights Proceeding**

52. Similar issues to those that I believe will be the subject of the Solara Rights Proceeding (as set out in paragraphs 48 to 51 above) were raised for determination in the Almond Land Rights Proceeding (which concerned a conditional sale and purchase deed entered into on 18 September 2009 between TSL, AMPL, Almond Land and Olam Orchards for almond properties and associated assets owned by Almond Land).
53. I had conduct of the Almond Land Rights Proceeding on behalf of ANZ, which was one of the secured creditors of Almond Land. The background facts and purpose of the Almond Land Rights Proceeding closely resemble those of the Solara Rights Proceeding.
54. I address in paragraphs 60 to 72 of my affidavit sworn on 19 September 2012 in the Liparoo and Yungera Rights Proceeding (as defined at paragraph 70 below) (the ***Hinchen Liparoo and Yungera Affidavit***) the following matters (among others) in connection with the Almond Land Rights Proceeding and the Almond Land Rights Appeal Proceeding (adopting the defined terms used in those paragraphs):
- (a) the factual background to the proceedings;
  - (b) the volume of material filed and served by the parties in advance of the first instance trial;
  - (c) the fields of expertise on which expert evidence was given in the first instance trial;



- (d) the first instance trial, including:
  - (i) its duration (12 days);
  - (ii) the number of witnesses; and
  - (iii) the finding by Justice Davies that the Growers were unsuccessful in their claims against the relevant fund of net sale proceeds and that ANZ and BOSI were entitled to the full amount of those net sale proceeds;
- (e) having regard to the specific issues which I believe will arise for determination in the Liparoo and Yungera Rights Proceeding (which I also believe will arise for determination in the Solora Rights Proceeding - see paragraphs 48 to 51 above), the key findings made in Justice Davies' Judgment (Exhibit CCH-2, document 19 to the Hinchin Liparoo and Yungera Affidavit) in respect of the Rights Issue and the Valuation Issue; and
- (f) the Almond Land Rights Appeal Proceeding, including (among other things):
  - (i) the appellant representative growers' grounds of appeal;
  - (ii) the position of the respondent banks (ANZ and BOSI); and
  - (iii) my belief that the appeal will not be heard until 2013.

**Relevance of the Almond Land Rights Proceeding to ANZ's application for approval of the Solora Deed of Compromise**

55. As noted in paragraphs 48 to 51 above, I believe the key issues likely to be addressed in the Solora Rights Proceeding will be the same or substantially similar to the matters determined by her Honour Justice Davies in the Almond Land Rights Proceeding, and which are now the subject of appeal.
56. Further, the constituent documents for the almond projects the subject of the Almond Land Rights Proceeding are broadly similar in content and form to the corresponding

  
Elina Hinchin

documents for the Citrus Project the subject of the Solora Rights Proceeding. In this regard, I note that the growers in the Citrus Project are subject to licence agreements rather than leases (see paragraph 18 above). As such, the constituent documents for that project bear a greater resemblance to the constituent documents for the licence-based projects the subject of the Almond Land Rights Proceeding, namely, the 2001 Almond Project, the 2002 Almond Project, the 2002 Private Offer Project and the 2003 Almond Project.

#### **Application of Justice Davies' Judgment in respect of the Rights Issue**

57. As noted at paragraph 69(b) and 71(b) of the Hinchey Liparoo and Yungera Affidavit, aspects of the Justice Davies' Judgment are the subject of a joint notice of contention served by ANZ and BOSI. If, however, the Court were to apply, without modification, the findings from the Justice Davies' Judgment to determine the rights of the parties in the Solora Rights Proceeding, then, in relation to the Rights Issue, the likely findings would be as follows.

- (a) To share in the Net Sale Proceeds, Growers would need to establish rights of a proprietary nature in and with respect to the citrus assets that were converted into the fund constituted by the Net Sale Proceeds (see paragraph 30 of Justice Davies' Judgment).
- (b) Growers in the Citrus Project (who, as noted in paragraph 56 above, were all subject to licence agreements) will be found to have acquired rights of a contractual nature only and, therefore, found not to have obtained a proprietary interest in the Net Sale Proceeds (see paragraph 48 of Justice Davies' Judgment).

#### **Application of Justice Davies' Judgment in respect of the Valuation Issue**

58. In relation to the Valuation Issue, even if it were assumed (contrary to the findings in Justice Davies' Judgment) that the Growers in the Citrus Project had a right to share in



the Net Sale Proceeds to the extent that they held rights which were valuable on extinction pursuant to paragraphs 2 and 3 of the 26 February 2010 Orders, the following matters of which I am aware support the proposition that any such rights held by the Growers in the Citrus Project were valueless in any case.

59. In the Justice Davies' Judgment, a number of relevant findings were made in the context of the Valuation Issue in respect of the almond projects the subject of the Almond Land Rights Proceeding. It is apparent from those findings, to which I refer in paragraph 78 of the Hinchin Liparoo and Yungera Affidavit, that her Honour approached the Valuation Issue insofar as it applied in the Almond Land Rights Proceeding by addressing two principal questions:

- (a) first, were the relevant projects viable under the existing structures; and
- (b) secondly, were the projects viable if restructured?

I consider these two questions, in turn below, in the context of the Citrus Project.

60. In Supreme Court of Victoria proceeding number S CI 2010 398, the Liquidators of TSL filed an affidavit of Mark Anthony Korda sworn on 8 February 2010 (**CCH-2, document 16**, without exhibits) in support of the Liquidators' application the subject of that proceeding. At paragraph 7 of that affidavit, Mr Korda deposed as follows:

TSL is hopelessly insolvent and is unable to continue managing the 2005 Citrus Scheme.

61. In the 26 February 2010 Judgment (**CCH-2, document 11**), Justice Davies considered the viability of the Citrus Project. Relevantly, her Honour noted:

12 ... [The Liquidators' evidence was that] ... the original scheme arrangements have broken down due to the insolvency of TSL and other companies in the Timbercorp group and the inability of TSL to fund the continued operations of the Citrus Scheme.

...


16 ... But as I have stated, the liquidators were doing no more than following the same strategy as they had in the other managed investment schemes to be able to facilitate the informal winding up the Citrus Scheme, if that was the appropriate course to take in the circumstances



where the Court on two previous occasions had directed that TSL was justified in using the s 601GC(1)(b) power to amend the scheme constitutions to confer an explicit power of termination in TSL.

18 In the circumstances of this case, I am satisfied that it was reasonable for the liquidators to consider that the rights of the members would not be adversely affected by the amendment. Here the decision to effect the amendment was taken in the context of the insolvency of TSL and its inability to perform its task as responsible entity because of its insolvency. It was not a decision made in a vacuum or an isolated action on the part of the liquidators, unconnected with the incapacity of the Citrus Scheme to continue because of the insolvency of TSL and other companies in the Timbercorp group. It was quite the contrary. The original scheme arrangements could not continue; TSL could not continue to fund the operation of the scheme; the amendment was made in anticipation of enabling an informal winding up of the Citrus Scheme. Had the liquidators instead sought to have the scheme wound up by direction of the court or sought to take steps to wind up the scheme in accordance with s 601NC of the Act, the licence agreements would have terminated by operation of cl 4.2(b)(iv) of those agreements. [Citations omitted.]

62. In relation to the viability of the Citrus Project in the event that it were restructured, based on paragraph 95 of Justice Davies' Judgment in the Almond Land Rights Proceeding (Exhibit CCH-2, document 19 to the Hinchin Liparoo and Yungera Affidavit), the Representative Growers would be required to establish on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the project restructured and continued to full term. In other words (and also as noted in paragraph 95 of the Justice Davies' Judgment), the Representative Growers would require an evidentiary basis from which the Court could evaluate the likelihood of a "restructure counterfactual" eventuating had the Growers' rights not been extinguished.
63. Having regard to the matters referred to in the Justice Davies' Judgment at paragraphs 96 to 136 thereof, and depending on the basis of any counterfactual case advanced by the Representative Growers, the Court is likely to have regard to the following matters in considering whether there was a chance for restructure of the Citrus Project:



- (a) legal issues concerning, among other things, the change of responsible entity for the Citrus Project and constitutional and contractual amendments;
  - (b) factual issues concerning, among other things, the market for hire of responsible entities and the terms of any consent given by a possible replacement responsible entity;
  - (c) the likelihood of any replacement responsible entity taking over as responsible entity of the Citrus Project, based on the probability of the project continuing to term in light of (among other things):
    - (i) the immediate cash needs of the project as against its expected future revenue;
    - (ii) the solvency position of other relevant companies in the Timbercorp group;
    - (iii) the need for constitutional and contractual changes;
    - (iv) the need to find a consenting responsible entity; and
    - (v) the possibility of conditions being imposed to any consent given by a responsible entity to assume that role in respect of the project.
64. These issues were the subject of extensive evidence and submission in the Almond Land Rights Proceeding. As far as I am aware, given the current status of the Solara Rights Proceeding (see paragraph 47 above), no such material has yet been prepared on these matters in the context of this proceeding.
65. I note, however, the matters deposed to by Mr Korda at paragraphs 36 to 63 of his affidavit sworn on 28 February 2011 in Supreme Court of Victoria proceeding number S CI 2011 888 (**Exhibit CCH-2, document 17**, with relevant exhibits), and also the matters deposed to at paragraphs 149 to 158 of the Kirk Affidavit (Exhibit CCH-2, document 7). In each case, the relevant paragraphs refer to unsuccessful proposals



made by Food and Beverage Australia Limited and interests associated with a Grower (Ms Kerree Bezencon) for appointment as replacement responsible entity of the Citrus Project.

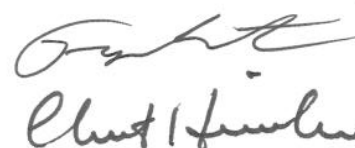
66. I note also that, based on paragraphs 22, 25, 26 and 34 of the McEvoy Affidavit (Exhibit CCH-2, document 6):

- (a) the Receivers were prepared to consider all offers for the Solora property and associated assets either as encumbered by the Citrus Project or on an unencumbered basis;
- (b) the Receivers received three bids for the purchase of the Solora property and associated assets; and
- (c) the preferred purchaser arising from the tender process, Agriproperty, wished to purchase the Solora property free from any encumbrances relating to the rights of the Growers in the Citrus Project.

67. Other than on a confidential basis, the McEvoy Affidavit does not disclose whether any of the two other bids contemplated a continuation of the Citrus Project. I note, however, that, at paragraph 26 of the 26 February 2010 Judgment (CCH-2, document 11), Justice Davies found as follows:

The sale process was undertaken by receivers and managers (the receivers) appointed to the owner of [the Solora] property. That sale process culminated in the receivers entering into a sale contract with Agriproperty. The sale process and bid offer accepted are described in detail in an affidavit of Mr McEvoy, one of the receivers. That evidence confirmed that the sale process was calculated to, and did, elicit a successful bid that was higher than the market valuation the receivers had for the property. **Three bids were received for the purchase of the Solora property and associated assets. Each of those bids had as a condition of purchase that the property be sold unencumbered by the growers' licences.** Agriproperty's bid was the highest and most acceptable bid. (Emphasis added.)

68. Based on the matters to which I refer in paragraphs 58 to 67 above, it is likely that, if it were assumed (contrary to the findings in Justice Davies' Judgment) that the Growers in



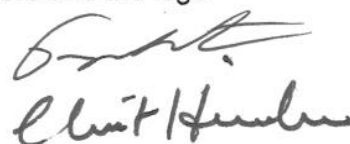


the Citrus Project had a right to share in the Net Sale Proceeds to the extent that they held contractual rights which were valuable on extinction pursuant to paragraphs 2 and 3 of the 26 February 2010 Orders, any such rights held by the Growers were valueless in any case because the Citrus Project was not viable at the time that the Growers' rights were extinguished.

69. In all the circumstances, if the key findings in the Justice Davies' Judgment are applied consistently in the present proceeding, the Growers in this proceeding are likely to be found to have no entitlement to the Net Sale Proceeds.

### **The Solora Deed of Compromise**

70. On 24 February 2012, on behalf of ANZ, my firm made a without prejudice settlement proposal to Clarendon Lawyers, on behalf of the Representative Growers, for the compromise of the Solora Rights Proceeding. That proposal noted, among other things, that the secured creditors in each of the following proceedings propose a global resolution of all of the proceedings on the basis that there would be a compromise of:
- (a) the Solora Rights Proceeding;
  - (b) Supreme Court of Victoria Proceeding S CI 2011 6604 (the *Liparoo and Yungera Rights Proceeding*);
  - (c) Supreme Court of Victoria Proceeding S CI 2011 6777 (the *Fenceport Rights Proceeding*);
  - (d) Supreme Court of Victoria Proceeding S CI 2010 1354 the *BB Olives Rights Proceeding*); and
  - (e) the Almond Land Rights Appeal Proceeding
- (together, the *Timbercorp Apportionment Proceedings*).
71. This settlement proposal (insofar as it applied to the Solora Rights Proceeding) was then the subject of negotiation between my firm, Clarendon Lawyers and the legal





representatives of OIM#2 and the Receivers until 25 July 2012, on which day the Solora Deed of Compromise was executed by or on behalf of each of the parties to the Solora Rights Proceeding and also on behalf of TSL (Exhibit CCH-2, document 5).

72. Also on 25 July 2012, deeds of compromise for each of the other Timbercorp Apportionment Proceedings were executed by or on behalf of each of the relevant parties and on behalf of TSL. I refer in the balance of this affidavit to the deeds of compromise for each of the Timbercorp Apportionment Proceedings as, collectively, the **Deeds of Compromise**.

73. I outline in paragraphs 74 to 77 below, in general terms, the key features of the Solora Deed of Compromise. Where, in these paragraphs, I refer to clause numbers, I am referring to the relevant clause number in the Solora Deed of Compromise. Reference should be made to the relevant clauses of the Solora Deed of Compromise for the specific provisions in question.

74. By clause 2, subject to the condition precedent set out in clause 3 being satisfied, the parties agree to the compromise the Solora Rights Proceeding by:

- (a) the making of the payments in accordance with clause 4; and
- (b) the giving of releases in accordance with clause 5

(the **Solora Compromise**).

75. By clause 3, it is a condition precedent to the Solora Compromise that, on or before 31 December 2012:

- (a) the Court approve the Solora Compromise in accordance with rule 16.01(4) of the Rules; and
- (b) the Court approve the compromise the subject of each of the other Deeds of Compromise.

76. By clause 4, as soon as practicable after the condition precedent in clause 3 is satisfied:



- (a) the following payments will be made by the Receivers from the Net Sale Proceeds:
- (i) to the extent approved by the Court, the unpaid costs of the Receivers;
  - (ii) to TSL to be held on trust for Growers for distribution to, or on behalf of, Growers in accordance with their entitlements (as addressed further in sub-paragraphs (b) to (h) below), \$650,000 or approximately 5% of the gross sale proceeds of the subject assets (**Solora Settlement Amount**);
  - (iii) ANZ will (to the extent possible) be repaid the amount owed to it from the Net Sale Proceeds; and
  - (iv) the balance of the Net Sale Proceeds (if any) will be paid to OIM#2;
- (b) the Solora Settlement Amount will be divided between Growers in the Citrus Project on a pro-rated basis according to the number of citruslots held by each such Grower on 9 April 2010 (being the date on which Growers' rights in the Citrus Project were extinguished by the Court). The amount payable per citruslot will be \$316.80. The entitlement of each Grower to the Solora Settlement Amount, in accordance with the above, is defined as its **Solora Settlement Entitlement**; and
- (c) in respect of each Grower who is not recorded in the books and records of:
- (i) Timbercorp Finance Pty Limited (in liquidation) (**TFL**) as owing amounts under an outstanding loan from TFL in connection with their investment in the Citrus Project (**TFL Indebtedness**); or
  - (ii) TSL as owing amounts to TSL (**Timbercorp Indebtedness**),
- TSL will pay its Solora Settlement Entitlement as soon as practicable to or at the direction of that Grower;
- (d) subject to sub-paragraphs (f) to (h) below, any Grower who is recorded in the books and records of:



- (i) TFL as having TFL Indebtedness:
- (ii) TSL as having Timbercorp Indebtedness,  
  
will be able (should they choose) to direct that their Solora Settlement Entitlement is paid, in whole or in part, to TFL or TSL to pay, to the extent possible, its TFL Indebtedness or Timbercorp Indebtedness (as applicable);
- (e) in respect of any Grower who has TFL Indebtedness and has directed TSL to pay its TFL Indebtedness, to the extent possible, out of its Solora Settlement Entitlement, TSL will, as soon as practicable, use the Grower's Solora Settlement Entitlement to pay, to the extent possible, the TFL Indebtedness as soon as practicable and remit the balance of the Grower's Solora Settlement Entitlement (if any) to the Grower (or, if directed by the Grower, to TSL in payment of any Timbercorp Indebtedness);
- (f) in respect of any Grower who has TFL Indebtedness and has not directed TSL to pay any part of its Solora Settlement Entitlement to TFL, TSL will hold that Grower's Solora Settlement Entitlement on trust pending agreement between TFL and the Grower or court order as to whom it should be paid;
- (g) in respect of any Grower who has TFL Indebtedness and has directed TSL to use its Solora Settlement Entitlement to pay only part of the Grower's TFL Indebtedness, TSL will, as soon as practicable, pay to TFL that part of the Grower's TFL Indebtedness and retain the balance of the Grower's Solora Settlement Entitlement (if any) on trust pending agreement between TFL and the Grower or court order as to whom it should be paid; and
- (h) a Grower who has both TFL Indebtedness and Timbercorp Indebtedness may not direct TSL to pay all or part of their Timbercorp Indebtedness out of its Solora Settlement Entitlement before there is an agreement in writing between




TFL and the Grower, or a court order, about the manner in which the entitlement is to be disbursed.

77. By clause 5, upon satisfaction of the condition precedent in clause 3 and the making of the payments in clause 4, each party will release all other parties from any further claim in relation to their entitlement to the Net Sale Proceeds or the allocation and disbursement of the Net Sale Proceeds.

**Communications with ASIC**

78. I refer to paragraphs 104 to 110 of the Hinchin Liparoo and Yungera Affidavit in relation to the communications between my firm and ASIC in relation to the Deeds of Compromise.

**SWORN** by **Clinton Charles Hinchin** at

Melbourne in the State of Victoria this

19th day of September 2012



Before me



**BENJAMIN PETER RECHTER**  
of 101 Collins Street, Melbourne  
Victoria 3000  
An Australian Legal Practitioner  
within the meaning of the  
Legal Profession Act 2004

**SCHEDULE**

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT**

S CI 2011 6606

List D

**B E T W E E N**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)**

Plaintiff

and

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

First Defendant

and

**MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) IN ITS CAPACITY AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

Second Defendant

and

**PAUL WILLIAM KIRK IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) IN ITS CAPACITY AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

Third Defendant

and

**ROBERT BUGDEN AND ELIZABETH BUGDEN (AS THE REPRESENTATIVES OF THE  
GROWERS IN THE 2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299))**

Fourth Defendants